

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL A. FORSTER
Claimant

VS.

PRECISION PATTERN, INC.
Respondent

AND

WAUSAU BUSINESS INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,035,851

ORDER

Claimant and respondent appeal the October 19, 2007 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded medical treatment with Bernard F. Hearon, M.D., as the authorized treating physician and temporary total disability compensation (TTD) until released at maximum medical improvement (MMI) by Dr. Hearon. Respondent was awarded a credit for the short-term disability benefits claimant began receiving after the original payments of TTD were stopped by respondent.

Claimant appeared by his attorney, Steven R. Wilson of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John M. Graham, Jr., of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 11, 2007, with attached exhibits; and the documents filed of record in this matter.

ISSUES

1. Did claimant sustain a personal injury by accident that arose out of and in the course of his employment with respondent? Respondent contends the ALJ erred in awarding claimant workers compensation benefits as claimant's condition is related to preexisting arthritis in

claimant's left shoulder and not to any injury suffered while at work. Claimant contends the arthritis, while preexisting, was aggravated and accelerated by claimant's work duties.

2. Did claimant give respondent timely notice of his accidental injuries?
3. Is claimant entitled to past and ongoing medical treatment, medical mileage reimbursement and TTD?
4. Did the ALJ exceed his jurisdiction in granting respondent a deduction from claimant's TTD payments for the short-term disability payments claimant has been receiving?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed with regard to the Order for a deduction of the short-term disability payments, but affirmed in all other regards.

Claimant has been employed by respondent for nearly nine years as a plant maintenance mechanic. In 2003, claimant suffered a fall on ice, injuring his left shoulder. That injury led to rotator cuff surgery under Dr. Hearon. In February 2007, claimant began experiencing pain in his left shoulder again. Claimant testified that this new problem arose from his everyday work activities with respondent. Claimant's work activities were clearly very physical, with claimant having to regularly lift weights between 10 and 100 pounds. Claimant also used hand tools on a regular basis which also required significant effort and put a strain on his shoulders.

Claimant's left shoulder pain continued to worsen until he reached a point, on April 16, 2007, where he could no longer perform his work duties. He reported his problems to his supervisor and was told to go to his personal physician, which he did. His personal physician, Dr. Sheryl Hemmen, ordered an MRI. When the MRI displayed another possible tear, claimant was referred by respondent to Travis D. Hubin, D.O. Dr. Hubin diagnosed the tear and placed claimant on what he described in his report of April 20, 2007, as "appropriate restrictions."¹ He was then referred back to Dr. Hearon.

The history contained in the report from Dr. Hearon dated May 10, 2007, discusses an April 16, 2007 injury when claimant was using a pipe wrench at work, "performing a

¹ P.H. Trans., Cl. Ex. 2.

pulling motion, when he felt a sharp pain in his left shoulder.”² The history contained in the report went on to note claimant’s pain was aggravated by overhead motion and by work activities. The report also noted claimant’s severe rheumatoid arthritis in the shoulder. A total shoulder replacement was recommended. The reports of May 24, 2007, and May 31, 2007, also noted the left shoulder injury to be work related and mentioned the severe arthritis. Claimant continued on limited duty at work. The May 31, 2007 report noted claimant’s decision to proceed with the recommended surgery, which occurred on July 23, 2007.

At some point, Dr. Hearon was contacted by Katherine Niewoehner of Wausau Insurance Company. In his letter to Ms. Niewoehner on June 5, 2007, Dr. Hearon noted for the first time that the “primary problem” with the shoulder was due to the rheumatoid arthritis, and was not due to a work-related injury.³

Claimant was referred to George G. Flutter, M.D., by his attorney for an examination on August 20, 2007. Dr. Flutter’s diagnosis of claimant’s condition was similar to that of Dr. Hearon, with the exception that Dr. Flutter found claimant’s need for shoulder replacement surgery to have been caused and/or contributed to by claimant’s work-related activities. The aggravation of the arthritis was due to the nature of the work activities with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

² P.H. Trans., Cl. Ex. 4.

³ P.H. Trans., Resp. Ex. 1.

⁴ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁷

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.⁸

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.⁹

Claimant’s testimony that his work was the only aggravating factor leading up to his increased left shoulder injuries suffered in 2007 is uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.¹⁰

Even though Dr. Hearon, after his significant directional change, determined that the preexisting arthritis was solely responsible for claimant’s need for a shoulder replacement, this Board Member finds the opinion of Dr. Fluter to be the more credible. While the opinion of Dr. Hearon, as the treating physician, is entitled to some weight, the change in direction of that opinion, after an unexplained contact with an insurance agent, is disconcerting. This Board Member, therefore, finds that claimant has proven that he

⁶ K.S.A. 2006 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁸ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁹ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

¹⁰ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

suffered an aggravation of his preexisting shoulder problems that arose out of and in the course of his employment with respondent.

Respondent further contends that claimant failed to provide timely notice of his injuries to respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.¹¹

K.S.A. 2006 Supp. 44-508(d) defines “accident” as,

... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.¹²

K.S.A. 2006 Supp. 44-508(d) goes on to state,

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.¹³

In order to determine whether timely notice was given as is required by K.S.A. 44-520, the Board must first determine the appropriate date of accident in this matter. Here, claimant was referred to the authorized treating physician, Dr. Hubin, who gave “appropriate restrictions” on April 20, 2007. Under K.S.A. 2006 Supp. 44-508, the date of

¹¹ K.S.A. 44-520.

¹² K.S.A. 2006 Supp. 44-508(d).

¹³ K.S.A. 2006 Supp. 44-508(d).

accident would be April 20, 2007. As claimant advised his supervisor of his work-related injuries on April 16, 2007, the requirements of K.S.A. 44-520 have been satisfied.

Respondent further objects to the award of past and ongoing medical treatment, TTD and mileage reimbursement.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹⁴

Those issues above discussed concerning medical treatment and TTD are not issues over which the Board takes jurisdiction on an appeal from a preliminary hearing order. Therefore, respondent's appeal of those issues, dealing with medical treatment, medical mileage and the award of TTD, are dismissed.

Claimant contends that the ALJ exceeded his jurisdiction in granting respondent a credit for money paid for short-term disability compensation.

K.S.A. 44-510f(b) provides:

If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an

¹⁴ K.S.A. 44-534a(a)(2).

agreement between the employer and employee or labor organization to which the employee belongs.¹⁵

Claimant's testimony is uncontradicted that he began receiving short-term disability benefits only after his TTD was discontinued. Additionally, the disability payments were paid in connection with a program through his employment.¹⁶ Pursuant to K.S.A. 44-510f(b), the credit provisions of that statute do not apply when dealing with an agreement between the employer and the employee, as, on the surface, appears to be the case here. Should this not be the case, the parties will have the opportunity to clarify the situation at the time of the final award. The ALJ's decision to grant respondent a credit for the short-term disability payments exceeds his jurisdiction and is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered accidental injuries arising out of and in the course of his employment through a series of microtraumas, with an accident date of April 20, 2007. Therefore, claimant's notice to respondent was timely. Respondent's appeal of the award of medical treatment, medical mileage and TTD is dismissed. The award of an offset to respondent for the short-term disability payments is reversed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated October 19, 2007, should be, and is hereby, reversed with regard to the award of a credit for the short-term disability payments, but affirmed in all other regards.

¹⁵ K.S.A. 44-510f(b).

¹⁶ P.H. Trans. at 27.

¹⁷ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

HONORABLE GARY M. KORTE

c: Steven R. Wilson, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge